the receipt for the money have to enter the records? Take as an illustration the petitory action now before us in which the Lord Ordinary has given decree for £112. Must this decree and a discharge of it be recorded in the Register of Sasines? or if not, will an onerous purchaser from the feuing company be entitled to say that the record discloses the obligation and discloses no discharge, and that the obligation must be made good to him?

Now, I venture to think that these observations, if sound in themselves, do bear on the question before us, for they go to this that a purchaser does not look to the records alone with reference to obligations of the nature and character of that in which the mistake now sought to be rectified occurs. It is foreign to the purpose of the Register of Sasines to record the cause and outcome of such obligations. I am not therefore moved by any considerations of the sanctity of the Register of Sasines in dealing with this case, and I rather think from another passage of the Lord Ordinary's note that his Lordship does not think that this sanctity could have prevailed if it had been proved that the Feuing Company had notice of the mistake before the purchase. But this is very important, for it implies that in the Lord Ordinary's opinion the records will not prevail over the considerations of justice and equity on facts proved by extraneous evidence.

And this leads one to what I shall venture to present as my most comprehensive and final view of the case, which is, that the question of rectifying a satisfactorily proved mistake in a written instrument is a question of real and substantial justice and equity, and so depends on the very truth of the matter in the actual case before the Court. If through the blunder of a copying clerk or of a plan colourist (I give these only as instances) an instrument fails to express what the parties to it intended, the mistake will be rectified unless there be good reason to the contrary. The only reason to the contrary with which we have here to deal is that in the meanwhile a *bona fide* purchaser for value on the faith of the mistake would suffer injustice if the rectification were made. I think this would be conclusive reason to the contrary if it were true in fact. But then I am clearly of opinion that it is not here true in fact. I think it is false in fact, being of opinion that it is proved that the Feuing Company (*i.e.*, their agents and directors) had no intention or thought of acquiring what the mistake, if left unrectified, will give them, and that the discovery of the expressions in which the mistake consists, and of the advantage they might take by them (if allowed to stand), came upon them as a surprise.

The Court pronounced this interlocutor:—

"Recal the Lord Ordinary's interlocutor in the action of reduction; declare, reduce, and decern in terms of the conclusions of the summons; in the petitory action assoilzie the defenders from the conclusions of the action."

Counsel for Watson's Trustees—Asher, Q.C.—R. Johnstone—Alison. Agent—R. Ainslie Brown, S.S.C.

Counsel for Glasgow Feuing and Building Company—M'Kechnie—Shaw. Agent—Thomas Carmichael, S.S.C.

Saturday, March 12.

SECOND DIVISION.

HASTON *v.* THE EDINBURGH STREET TRAMWAYS COMPANY (LIMITED).

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1—*Plant.*

While a lad in the employment of a tramways company was, in the execution of his ordinary duty, riding one of their horses, it fell and caused severe injuries to him. It was proved that the horse was in a condition unfit for the work it was put to, and that this was known to persons in the company's service entrusted with the duty of seeing that their horses were in proper condition. *Held* (1) that a horse was part of the company's "plant," and (2) that its use while in a defective and dangerous condition was due to their fault, and *therefore* that they were liable in damages.

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42) provides—"1. Where, after the commencement of this Act, personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of or in the service of the employer or engaged in his work. 2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say (1), under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered and remedied owing to the negligence of the employer, or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery, and plant were in proper condition."

This action was brought in the Sheriff Court of the Lothians by James Haston, a trace-boy in the service of the Edinburgh Street Tramways Company (Limited), and his father as his administrator-in-law, against the said Tramways Company. It was raised at common law, and alternatively under the Employers Liablity Act 1880. The pursuer, who was thirteen years of age, averred that on the first of April 1886, in the exercise of his duty, he was taking two horses down the Regent Road, riding upon one and leading the other by the reins; that while proceeding at a walking pace, when near Abbey Mount, the horse on which he was mounted fell down, throwing him off, and afterwards rolled over him twice; that he was taken to the Infirmary, where it was found that his left leg and ankle were broken, and he was incapacitated from work for three months. He averred (Cond. 4) that the mare in question was "worked out, and broken and gone about the legs, knees, and feet. It was addicted to falling on the street, and had fallen several times about the time this accident took place. It was further subject to disease of the spine, or staggers, or some other ailment which

predisposed it to falling, and rendered it wholly unfit for the work to which it was assigned. On the occasion in question the said horse fell by and in consequence of these defects, and constitutional and physical weaknesses to which it was subject. The defenders and their superintendents and inspectors for whom they are responsible were aware of the defects, faults, or habits of the animal"—and that the pursuer was not aware of its habits or disposition. The defenders averred that the horse was sound in wind and limb at the time of the accident, and that the pursuer had teased the horse on the day in question, so as to cause the animal to kick, and that thus the accident occurred.

The pursuer pleaded—"(2) The pursuer James Haston being a workman of the defenders, and his said injuries having been caused by a defect in the condition of the machinery or plant connected with or used in the business of the employers, the pursuer is entitled to decree as craved with expenses. (3) The injuries to the said James Haston having been caused by the negligence or fault of a person having the superintendence of the defenders' work at which he was employed, the pursuers are entitled to decree as craved with expenses."

The defenders pleaded—"(2) The accident in question not having been caused by the fault of defenders, or of any one for whom they are responsible, they are entitled to absolvitor. (3) The accident having been occasioned, or at least materially contributed to, by the pursuer James Haston, the defenders are entitled to absolvitor."

On the part of the pursuer it was proved that on the day in question he was going at a walking pace when the accident occurred, that the same mare had fallen with several other boys before that time, and that the man who had charge of her in the stables had told the father of the pursuer that she was a "footless useless brute." On the part of the defenders it was proved that no complaint had ever been made to any of the officials of the company that the mare had fallen, or was considered unsafe, and two veterinary surgeons who saw her shortly after the accident occurred deponed that she then seemed in sound condition.

On 20th November 1886 the Sheriff-Substitute (HAMILTON) found that it was not proved that the accident libelled was caused by the fault or negligence of the defenders, or of those for whom they were responsible. He therefore assoilzied them from the conclusions of the petition.

"*Note.*—At the discussion on the proof the pursuer's agent admitted that he had not made out a case for damages at common law, but stated the claim under section 1, sub-section 1, of the Employers Liability Act 1880 was still insisted in. As regards the latter claim, the Sheriff-Substitute is unable to hold the pursuer's proof as at all sufficient. In the first place it is not shown that the injury libelled was sustained by reason of a defect in the condition of the horse which the pursuer James Haston was riding at the time of the accident—in other words, that the horse was suffering under some disease or constitutional weakness which caused its fall on the occasion in question. And in the second place it is not proved that the existence of such defect was brought to the knowledge of the defenders, or of their inspectors or superintendents, so as to make the defenders liable for continuing to use the horse in their business."

The pursuer appealed to the Sheriff (CRICHTON), who on 28th December adhered to the Sheriff-Substitute's interlocutor.

"*Note.*—The Sheriff is of opinion that the pursuers have failed to establish their case against the defenders either at common law or under sect. 1, sub-sect. 1, of the Employers Liability Act 1880.

"The fault or negligence on the part of the defenders which is averred is that the mare which was under the charge of the pursuer James Haston at the time of the accident was —[*the Sheriff here quoted Cond.* 4].

"The first and third of these allegations in regard to the mare have been proved not to be well founded. It is true that she had previous to the accident to the pursuer fallen several times when under the charge of the trace-boys in the defenders' employment. On the other hand, the drivers in the defenders' service say they 'neither saw the animal falling on any occasion nor heard of her doing so.' It is certain that no complaint was made to the defenders or their inspectors or superintendents that the mare had fallen, and they did not know that she had fallen. It is libelled that the mare fell either in consequence (1) of the carelessness of the pursuer James Haston, (2) of loose stones being on the road, or (3) of her having been tickled when the pursuer was riding her.

"The Sheriff holds that the word 'plant' which occurs in the statute includes animals used for the purpose of a business.

"The Sheriff concurs with the Sheriff-Substitute that it has not been proved that the injury to the pursuer James Haston was sustained by reason of the defective condition of the plant used in the defenders' business. But even if it could be held that the mare was defective, this was not due to any negligence on the part of the defenders or those entrusted by them with the duty of seeing that the plant was in proper condition."

The pursuer appealed to the Court of Session, and argued—It was proved that the accident had happened because the horse on which the pursuer was riding at the time was unfit for the work; that was a defect in the meaning of section 1, sub-section 1, of the Employers Liability Act 1880; this unfitness was known to the persons who had charge of the animal, and therefore it ought to have been known to the officials of the Tramways Company, and under section 2, sub-section 1, of the Act they were therefore liable in damages. The pursuer had not contributed in any way to the accident.

Authority—*Crichton* v. *Keir & Crichton*, Feb. 14, 1863, 1 Macph. 407.

Argued for the defenders—The pursuer had failed to prove that the horse was unfit for the work to which it was put. It had been examined by two veterinary surgeons, both of whom deponed that the animal was in sound condition. Even if there was a defect in the horse on account of which the accident had happened, it was proved that no complaint had been made to any superior servant, and the company therefore was not liable, for the Act, sec. 2, provided that "a workman shall not be entitled to any right of

compensation or remedy under this Act . . . (sub-sec. 3) in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give or cause to be given information thereof."

At advising—

LORD YOUNG—Upon the matter of fact in this case I think the pursuer's averments as to the condition of the horse which was the cause of the accident are true. Several trace-boys were examined, with all of whom the horse had fallen within the year, and then there is the roadman Irving whose special notice this horse attracted. He gives it a very bad character. He says he saw it fall repeatedly—about a dozen times at all events. Indeed, his impression as to the condition of the horse was such that he has called out to the boys whether they had insured their lives. I think, therefore, that the unsafe condition of the horse is proved. But the Tramways Company say that no complaint was ever made to them; that the boys never made any complaint at the office of the company. I think that is quite true. I think that there is no evidence of the trace-boys ever having made any such complaints. But at the same time I think it is the fact that those in charge of the horse at the stables knew of its condition. Indeed they could hardly fail to know. The pursuer's father says that one of the stablemen, Robertson, described the horse to him as "a footless useless brute," and Robertson himself says that the expression he used was that it was "a lazy useless brute." The best evidence for the company is that of Duncan M'Arthur, a veterinary surgeon, who is called strangely enough by the pursuer. He examined the horse in July—the accident having taken place in the previous April—and he gives it a good character. But notwithstanding his testimony I am of opinion that the horse was in such a condition that it ought not to have been used on the tramway; and further, that those in charge of it on the part of the company must be held to have known of its condition.

The question of law then arises, Are the Tramways Company liable in damages to the pursuer for the accident, which was the natural and to be anticipated result of the horse's condition. I think they are. The horses used by the company are part of its plant, and they are bound to employ persons to see that it is in a safe condition, with reference not merely to the safety of the public who make use of their conveyances, but also of persons in their employment. And I think that in permitting this horse to be continued in use fault is to be imputed to those whose duty it was to look after the horses, and through them to the company.

I therefore should propose, if your Lordships agree with me, that the following interlocutor should be pronounced.—[*His Lordship then read the interlocutor afterwards pronounced*].

LORD CRAIGHILL, LORD RUTHERFURD CLARK, and LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, find in fact that the pursuer James Haston sustained serious personal injury by the horse on which he was riding, in the performance of his duty as the defenders' servant, falling and rolling over upon him; that the horse was the property of the defenders and used by them in their business; that it was in a defective and dangerous condition, and unfit to be used by the defenders as it was at the time of the accident to the pursuer and for a considerable time before, and that it was so used while in a defective and dangerous condition owing to the negligence of the defenders or of some person in their service, and entrusted by them with the duty of seeing that the horses used by them in their business were in proper condition to be used with reasonable safety; and that the personal injury sustained by the pursuer was caused by reason of the said defective and dangerous condition of the said horse: Find further in fact that there was no negligence or fault on the part of the pursuer: Find in law that the defenders are liable in damages to the pursuer, and assess the same at the sum of Fifty pounds sterling: Therefore sustain the appeal, recal the interlocutor appealed against: Ordain," &c.

Counsel for Pursuer—M'Lennan. Agent—J. D. Macaulay, S.S.C.

Counsel for Defenders—Paterson. Agents—Paterson, Cameron, & Co., S.S.C.

Wednesday, June 18, 1879.*

FIRST DIVISION.

[Sheriff of Ayrshire.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* ORR.

Reparation—Carrier—Railway—Use of Trucks.

A trader was in use to have a large amount of traffic conveyed for him over the line of a railway company which conveyed goods to the place at which he carried on business. The company intimated to him that a fixed charge would be made for each waggon detained longer than twelve working hours after notice of arrival, and also regularly inserted in their advice-notes intimating the arrival of goods for him notice that such charge would be made. In an action for demurrage at this fixed rate, or alternatively for damages for detention of waggons longer than twelve working hours after each advice-note—*held* that the defender had failed to prove that in the circumstances of his trade twelve working hours was not a reasonable and sufficient time in which to take delivery, that he had wrongfully failed to take such delivery, and therefore that he was *liable in damages* to the railway company.

This action was raised by the Glasgow and South-Western Railway Company against William Orr, grain merchant and coal agent, Irvine, carrying on an extensive business in Ayrshire, in the course

* This case, which appears to have been omitted at the time of its decision, has recently been brought under the notice of the Reporters as one of importance, and is herefore now reported.